IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. MARVIN DARYL TABRON, Petitioner.	2 CA-CR 2007-0209-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR11943

Honorable Charles A. Irwin, Judge

REVIEW GRANTED; RELIEF DENIED

Marvin Daryl Tabron — Florence
In Propria Persona

V Á S Q U E Z, Judge.

¶1 After a 1986 jury trial, petitioner Marvin Tabron was convicted of two counts of child molestation. The trial court sentenced him to consecutive, presumptive prison terms of seventeen and twenty-eight years. This court affirmed Tabron's convictions and sentences on appeal. *State v. Tabron*, No. 2 CA-CR 4788 (memorandum decision filed Nov. 10, 1987). In 1990, Tabron filed his first petition for post-conviction relief pursuant to Rule 32,

Ariz. R. Crim. P., which the trial court summarily dismissed. In 1991, this court denied Tabron's petition for review of that ruling, finding that he had previously raised on appeal the same issue he presented in his petition for post-conviction relief. *State v. Tabron*, No. 2 CA-CR 1990-0762-PR (order dated Mar. 19, 1991). More than twenty years after he was sentenced, Tabron filed this, his second petition for post-conviction relief, which the trial court summarily dismissed, finding all of Tabron's claims precluded. In his pro se petition for review, Tabron challenges the trial court's dismissal of his petition for post-conviction relief and his motion for an extension of the time to file a motion for rehearing. We will not disturb a trial court's ruling on a petition for post-conviction relief unless the court has clearly abused its discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶2 Tabron argues the trial court erred by denying his request that counsel be appointed to represent him in the second post-conviction proceeding. However, not only was Tabron previously represented by counsel on appeal, but this was not his first Rule 32 proceeding. Accordingly, he was not entitled to counsel. Rather, it was for the trial court to determine, in the exercise of its discretion, whether to appoint counsel. *See* Ariz. R. Crim. P. 32.4(c)(2) (trial court shall appoint counsel upon filing of first notice in a Rule 32 of-right proceeding).

¶3 Tabron next argues he was entitled to relief on his claim that his sentences were improper. He primarily claims he was sentenced in violation of *Blakely v. Washington*,

542 U.S. 296 (2004), because the judge, rather than a twelve-person jury, found aggravating factors and sentenced him. But, *Blakely* does not apply retroactively to defendants like Tabron, whose convictions became final when this court issued its mandate on appeal in 1987, years before *Blakely* was decided. *State v. Febles*, 210 Ariz. 589, ¶ 7, 115 P.3d 629, 632 (App. 2005). Moreover, *Blakely* does not apply to presumptive prison terms. *State v. Johnson*, 210 Ariz. 438, ¶ 10, 111 P.3d 1038, 1041 (App. 2005). Although Tabron could not have raised a *Blakely* claim on appeal or in his first post-conviction proceeding as the trial court seems to suggest, we nonetheless agree the trial court correctly denied relief on this claim. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court will affirm trial court's ruling if it is legally correct for any reason). We decline to address Tabron's ill-conceived argument that he was entitled to a twelve-person jury at sentencing because his sentence could have, and in fact did, exceed thirty years. *See* A.R.S. § 21-102(A) (twelve-person jury required *to render a verdict* in a criminal case in which imprisonment for thirty years or more is authorized by law).

¶4 Tabron also contends he is entitled to relief under *Crawford v. Washington*, 541 U.S. 36 (2004), claiming that the testimony of certain witnesses violated his confrontation rights. Not only did Tabron fail to present this argument to the trial court in his petition below, precluding us from addressing it on review, *see generally* Rule 32.9, Ariz. R. Crim. P., he raised a related argument, albeit not relying on *Crawford*, on appeal. For both of these reasons, we refuse to address this argument on review. *See State v.*

Ramirez, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider on review any issue trial court did not have opportunity to consider); *see also* Ariz. R. Crim. P. 32.2(a)(2) (defendant precluded from relief based on any ground finally adjudicated on the merits on appeal); Ariz. R. Crim. P. 32.9.

¶5 Finally, Tabron argues he was entitled to relief on his claim that trial counsel was ineffective for failing to fully explain the ramifications of the state's plea offer. Tabron presented this argument in great detail in his petition for post-conviction relief, arguing that *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), was a significant change in the law entitling him to relief and that he would have accepted the state's plea offer if counsel had explained it to him. On review, Tabron has cited the standard of review for a claim of ineffective assistance of counsel, without setting forth "the reasons why the petition [for review] should be granted" regarding this claim, as Rule 32.9(c)(1)(iv) requires. Moreover, according to the exhibits attached to the state's response to the petition below, the validity of which Tabron apparently does not dispute, the proposed plea offer was contingent on Tabron's willingness to submit to psychological interviews and on the outcome of those interviews. Notably, the state revoked its "conditional plea offer" two months after it was proposed, apparently having received no response from Tabron. "'[T]he constitutional principles underlying *Donald* come into play only when a concrete plea offer has been made by the state,'" an event that did not occur here. *State v. Vallejo*, 215 Ariz. 193, ¶ 7, 158 P.3d 916, 918 (App. 2007), *quoting State v. Jackson*, 209 Ariz. 13, ¶ 11, 97 P.3d 113, 117

(App. 2004). Because there was no firm plea offer to convey, counsel was not ineffective for allegedly failing to explain the offer to Tabron. Therefore, even assuming without deciding that the trial court erroneously found the claim precluded, the court did not abuse its discretion by denying post-conviction relief.

¶6 Accordingly, although we grant the petition for review, we deny relief.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge